United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-5025

"Original"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

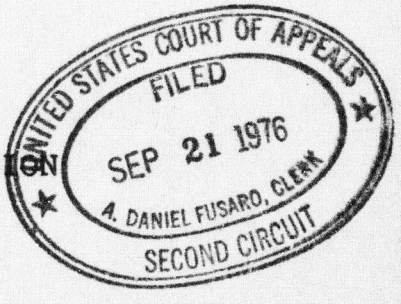
In the Matter of

THE NEW YORK, NEW HAVEN
AND HARTFORD RAILROAD COMPANY,

P/S

Debtor

On Appeal From the United States
District Court for the District of Connecticut
Honorable Robert P. Anderson, Circuit Judge
Sitting by Designation



BRIEF OF THE INTERSTATE COMMERCE COMMISSION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of	)	
	)	
THE NEW YORK, NEW HAVEN	)	
AND HARTFORD RAILROAD COMPANY,	)	No. 76-5025
	)	
Debtor	)	

On Appeal From the United States
District Court for the District of Connecticut
Honorable Robert P. Anderson, Circuit Judge
Sitting by Designation

BRIEF OF THE INTERSTATE COMMERCE COMMISSION

QUESTIONS PRESENTED

1. Whether the Reorganization Court's Order No. 789A, entered June 30, 1976, overruling and vacating certain orders of the Interstate Commerce Commission issued pursuant to Section 77(c)(12) of the Bankruptcy Act, 11 U.S.C. §205(c)(12), was clearly erroneous and without warrant in law.

2. Whether, notwithstanding enactment of Section 618(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976, the Reorganization Court lacked jurisdiction to

award compensation to various Section 77(c)(12) claimants without first referring their petitions to the Commission for the setting of maximum limits.

STATUTES PRIMARILY INVOLVED

Section 77(c)(12) of the Bankruptcy Act, 11 U.S.C. 205(c)(2), provides in pertinent part:

> Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees, incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositories and such assistance as the Commission with the approval of the judge may especially employ . . . .

Section 618(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, provides:

> (b) Section 601(b) of such Act (45 U.S.C. 791(b)) is amended to read as follows:
>
> * * *
>
> (4) The powers and duties of the Commission under section 77 of the Bankruptcy Act (11 U.S.C. 205), with respect to a railroad in reorganization in the region which conveys all or substantially all of its designated rail properties to the Corporation or a subsidiary thereof,

> or to profitable railroads in the region, pursuant to the final system plan, and the requirement that plans of reorganization be filed with the Commission, shall cease upon the date of such conveyance. The powers and duties of the Commission under section 77 of the Bankruptcy Act shall also so terminate, as of the date of enactment of this paragraph, with respect to any railroad in reorganization under such section 77 but not subject to this Act which (1) does not operate any line of railroad, and (2) has transferred all or substantially all of its rail properties to a railroad in reorganization in the region which was subject to this Act prior to the date of enactment of this paragraph. Thereafter, such powers and duties of the Commission shall be vested in the district court of the United States which has jurisdiction of the estate of any such railroad in reorganization at the time of such conveyance. Such court shall proceed to reorganize or liquidate such railroad in reorganization pursuant to such section 77 on such terms as the court deems just and reasonable, or pursuant to any other provisions of the Bankruptcy Act, if the court finds that such action would be in the best interests of such estate. This paragraph does not affect any obligation of any carrier by railroad subject to regulation under the Interstate Commerce Act. The powers and duties of the Commission under section 77 of the Bankruptcy Act shall continue in effect only to the extent that the railroad in reorganization continues to operate any line of railroad.

PRELIMINARY STATEMENT
REQUIRED BY LOCAL
RULE NO. 28(2)

The Honorable Robert B. Anderson, Circuit Judge, sitting by designation, rendered the decisions appealed from. To the best of our knowledge those decisions have not yet been reported.

STATEMENT OF THE CASE

This is an appeal from two orders entered by the New Haven Reorganization Court on June 30, 1976. By order No. 789A the Court overruled and vacated certain orders of the Interstate Commerce Commission setting the maximum limit of Section 77(c)(12) compensation for Lawrence W. Iannotti and his counsel at zero. In the second order the Court awarded more than $3,000,000 in compensation to various Section 77(c)(12) claimants, including Iannotti, without first referring their petitions to the Commission for the setting of maximum limits.

In order to put the issues involved here in proper perspective, it will be useful to discuss the background leading up to the institution of this appeal in some detail. On February 9, 1973, Laurence W. Iannotti, successor trustee under the New York, New Haven and Hartford Railroad Company's (New Haven) First and Refunding Mortgage, and Tyler, Cooper, Grant, Bowerman & Keefe, his counsel, filed petition for Order No. 691 with the United States District Court for the District of Connecticut, sitting as a Reorganization Court, Circuit Court Judge Robert Anderson presiding.[1/] By that petition Iannotti asked the Court to refer his petition for interim compensation for the period July 1, 1971, through December 31, 1972, to the Interstate Commerce Commission (Commission) for the setting of maximum limits of compensation pursuant to Section 77(c)(12) of the Bankruptcy Act, 11 U.S.C. §205(c)(12). By Order No. 691, entered March 27, 1973, the Court referred the petition to the Commission for the setting of maximum limits. The petition, which was unopposed, was processed under modified procedure in which evidence is presented in the form of verified statements (affidavits) and an

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1/ Hereinafter collectively referred to as Iannotti or "the Iannotti petition." (App. 215a).

oral hearing held only if necessary for cross-examination. After consideration of Iannotti's presentation, the Commission's Division 3 issued a report and order in Finance Docket No. 21669 on February 5, 1975, in which it fixed the reasonable maximum limit of interim compensation and expenses at zero (App. 271a).

Notwithstanding the Commission's action on Iannotti's petition, several other Section 77(c)(12) claimants filed similar petitions with the Court in June, 1975, requesting that they be referred to the Commission for the setting of maximum limits (App. 36a-74a). By order entered August 20, 1975, these petitions were also referred to the Commission. The Commission has never taken any action on these petitions.

On October 9, 1975, Division 3, Acting as an Appellate Division, denied Iannotti's petition for reconsideration (App. 330a). As the Commission's action on Iannotti's petition became administratively final with the entry of the October order and the petitioner had exhausted his administrative remedies, he filed petition for Order No. 789 with the Reorganization Court on December 23, 1975 (App. 1a). In that petition Iannotti sought to have the Court: 1) review and set aside the Commission's order; and 2) otherwise grant him interim compensation for the updated period July 1, 1971, through June 28, 1974. A hearing on the petition was scheduled before the Court on January 20, 1976, but later postponed until May 10, 1976.

Prior to the hearing on petition for Order No. 789, however, President Ford signed into law the Railroad Revitalization and Regulatory Reform Act of 1976 (The 4R Act), P. L. No. 94-210. Section 618(b) of that Act amended section 601 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. §791), by adding a new section 601(b)(4). Title VI of the 1973 Act generally dealt with the relation of that Act to other laws, and section 601(b)(4) was added to terminate the Commission's Section 77 powers and duties with respect to certain railroads then in reorganization whose rail properties were being conveyed to ConRail pursuant to the Final Systems Plan and vest such powers in the Reorganization courts. Section 618(b) provided further that in the case of the New Haven and similarly situated railroads the Commission's jurisdiction terminated on February 5, 1976.

After the enactment of P.L. No. 94-210, the New Haven's trustee on March 11, 1976, filed petition for Order No. 795 in which he, as pertinent to this proceeding, asked the Court to: 1) hold that all of the Commission's Section 77 jurisdiction terminated on February 5, 1976; and, 2) fix procedures for the filing and processing of petitions then present and future petitions under Section 77(c)(2) and (c)(12) (App. 25a).

In a similar vein, Iannotti sought by petition filed March 23, 1976, to modify his previous petition for Order No. 789 on the ground that the Commission no longer had jurisdiction over the applications referred to in Petition for Order No. 789 (App. 18a). A hearing was held on the trustee's petition and by Orders No. 795 (A, B & C) entered April 14, 1976, Judge Anderson concluded that the Commission's powers and duties under Section 77 of the Bankruptcy Act terminated on February 5, 1976, and vested in the Court (App. 30a-35a). Judge Anderson, at the same time, ordered that further hearings be held on the merits of the various claimants' petitions without first referring them to the Commission for the setting of maximum limits.

At the April 14 hearing the Court also indicated that, notwithstanding the Commission's prior action on Iannotti's petition, it would, in effect, consider de novo any new petition filed by Iannotti for compensation. Being of the view that the Court's intended action would effectively moot judicial review of the Commission's prior order, no representative of the Commission attended the May 10, 1976, hearing on Iannotti's petition. Although Iannotti also believed that independent consideration by the Court of a new petition for compensation would essentially moot his appeal from the Commission's order (App. 189a), the Court, nonetheless overruled and vacated the Commission's orders setting maximum limits of

compensation at zero (App. 191a).[2/]

On May 17, 1976, the Commission's counsel was informed by the Department of Transportation (DOT) that the Secretary of Transportation had decided to seek to amend Section 601(b)(4) of the Regional Rail Reorganization Act of 1973 to return to the Commission the powers and duties it formerly had over setting maximum limits for compensation and expense allowances under section 77(c)(2) and (12). We were advised that DOT would sponsor a floor amendment to the "Amtrak Improvement Act of 1976" bills then pending in Congress which would accomplish its purpose. In view of the possible consequences that such legislation would have on Section 77 compensation matters, if enacted, a Commission representative attended a hearing held by the Court on May 18, 1976, to consider certain section 77(c)(12) petitions. At the hearing the Commission, while explaining to the Court that the Commission had no part in sponsoring the amendment, requested the Court to stay its action until such time as Congress acted on the DOT amendment. Judge Anderson, however, denied our request and stated that he would take the outstanding petitions under advisement. He was of the view that any action by Congress on DOT's amendment was speculative and did not justify a stay.

2/ The Court stated that it was overruling and vacating the Commission's order at the May 10, 1976, hearing. It did not, however, enter its order overruling and vacating the Commission's orders until June 30, 1976, (App. 23a).

By judgment entered June 30, 1976, the Court thereafter awarded a total of over $3,000,000 to the various Section 77(c)(12) claimants, including Iannotti, without first having the Commission set maximum limits of compensation (App. 118a). Virtually all of the services for which compensation was awarded were rendered prior to February 5, 1976. In addition, the Court also entered its order overruling and vacating the Commission's report and orders regarding Iannotti's compensation. It is these two orders that are the subject of the instant appeal docketed on July 12, 1976.

In addition to filing an appeal from the Court's orders, we also filed a motion for stay of judgment pending appeal with Judge Anderson (App. 211a). A hearing on our Motion was held on July 29, 1976, at which time we contended that it would be difficult, if not impossible, to recover any sums paid out should the Commission prevail on the merits of its appeal and later set maximum limits of compensation in amounts less than those approved by the Court. Judge Anderson, however, being of the view that we were not likely to prevail on appeal because our appeal was frivolous and that there was no showing of any injury denied our motion (App. 212a-214a).

INTRODUCTION

It is important to note here that this appeal involves two separate orders of the Reorganization Court. Our primary concern on appeal lies with Order No. 789A entered on June 30, 1976, overruling and vacating the Commission's prior orders fixing Iannotti's compensation at zero for the period July 1, 1971, through December 31, 1972. In our view, the Court's order was clearly erroneous in light of standards of judicial review of a Commission order under Section 77(c)(12) set out in R.F.C. v. Bankers Trust Co., 318 U.S. 163 (1943). The Court's action, if not reversed, may create a serious problem for the Commission's future handling of Section 77(c)(12) petitions in railroad reorganization proceedings not affected by the Railroad Revitalization and Regulatory Reform Act of 1976.

We are also concerned with the Court's order entered June 30, 1976, awarding compensation to the various Section 77(c)(12) claimants - including Iannotti - without first referring these petitions to the Commission for the setting of maximum limits. In our view Section 618(b) has only prospective application and does not apply to services rendered prior to February 5, 1976. As to those services the Commission must still fix maximum limits of compensation, and, consequently, the Court erred in awarding compensation for services rendered during that period without first referring the matter to the Commission.

As we realize - but do not agree - that this portion of the Commission's appeal is subject to a claim of res judicata or estoppel, we believe an explanation of the Commission's actions before the Reorganization Court is in order. Prior to May 17, 1976, the Commission did not challenge the Court's jurisdiction to award compensation without prior referral to the Commission, and, in fact, agreed with the petitioners that such action was not necessary at the hearing held on April 14, 1976. On May 17, 1976, however, the Commission's position was dramatically altered by the Department of Transportation's notification that it was seeking to restore Section 77(c)(12) jurisdiction over the New Haven to the Commission. We recognized that if the Court awarded compensation to Section 77(c)(12) claimants for services rendered prior to February 5, 1976, without first referring their petitions to the Commission - and jurisdiction was later returned to the Commission - a serious question of the legal status of the Court's order entered during the hiatus in the Commission's jurisdiction would arise. In order to avoid this problem we first asked Judge Anderson to stay action on the petitions then before him until such time as Congress acted on the DOT proposal. The Court, however, refused our request, took the petitions under advisement, and, thereafter, issued the order in question on June 30, 1976.

Since our effort to keep the status quo had failed, we then filed a notice of appeal from the Court's order on the ground that the Court lacked jurisdiction to award the compensation without first referring the petitions to the Commission. It has now become clear, however, that Section 77(c)(12) powers will not be returned to the Commission.[3/] Notwithstanding this fact and the fact that our position has changed, we submit, for the reasons set out below, that the issue is, nonetheless, properly before this Court at this time.

It is important to note, moreover, that assuming arguendo estoppel does apply here, it has no application to our appeal from the Court's order overruling and vacating the Commission's Iannotti orders. While we did not attend the May 10, 1976, hearing on Iannotti's petition for judicial review of the Commission's orders because we believed review to be moot, we did advise Judge Anderson by letter dated May 7, 1976, that the Commission's action under review was entirely proper and should be sustained.[4/] Furthermore, we filed a timely appeal from the

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3/ Even though the Commission's Vice Chairman testified on June 22, 1976, before the House Subcommittee on Transportation and Commerce that the Commission saw no reason for having jurisdiction returned to it, our appeal was designed to protect our own interests in the event that jurisdiction was, in any event, returned.

4/ The Court had indicated at the April 14, 1976, hearing that, notwithstanding the Commission's orders setting the maximum limit of Iannotti's compensation at zero, it could, in effect, give de novo consideration to a new petition. The petitioner, moreover, stated, in effect, at the May 10 hearing that it was of the view that de novo consideration mooted the request for judicial review (App. 187a).

Court's order entered June 30, 1976, overruling and vacating the Commission orders. For these reasons we submit that any attempt by the appellees to link this order to their claim of estoppel is improper.

ARGUMENT

I.

THE REORGANIZATION COURT'S ORDER NO. 789A WAS CLEARLY ERRONEOUS AND WITHOUT WARRANT IN LAW.

The Reorganization Court, by Order No. 789A entered June 30, 1976, rejected the Commission's position that the Commission's orders under review were entirely proper and should be sustained.[5/] Stating no reason for its decision the Court ordered:

> "1. That the Report and Order dated February 5, 1975, and the Order dated October 9, 1975, of the Interstate Commerce Commission in Finance Docket No. 21669, Exhibits D and F to the Joint Petition, be, and they hereby are, overruled and vacated; and
>
> 2. That any entry of decision made pursuant to such Report and Orders be, and it hereby is, reversed and vacated."

We respectfully submit that there was absolutely no warrant in law for the action of the Reorganization Court. New Haven Inclusion Cases, 399 U.S. 392, 435 (1970); In re Penn

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5/ As noted above, we advised the Court of the propriety of the Commission's action by letter dated May 7, 1976. The substantive body of that letter read as follows:

> Dear Judge Anderson:
>
> This letter is being written to advise you that no member of this office will be present at the hearing to be held on Monday, May 10, 1976, in the above-captioned proceeding.
>
> While we, of course, submit that the Commission's action on Mr. Iannotti's petition for compensation under Section 77(c)(12) was entirely proper and should be sustained by the Court, the Court's statement at the prior hearing on this matter on April 14, 1976, that it will in any event, entertain a new petition for compensation, makes our presence at the May 10, 1976, hearing unnecessary.

Central Transportation Company, 454 F.2d 9, 13 (3rd Cir. 1972). Consequently, the Court's order was clearly erroneous and should be reversed.

It is long-settled that a district court may not disturb a Section 77(c)(12) finding of the Commission as long as the finding is supported by substantial evidence. R.F.C. v. Bankers Trust Co., 318 U.S. 163 (1943). In Bankers Trust the Supreme Court specifically dealt with the limited scope of review applicable to Section 77(c)(12) orders of the Commission. In this respect it succintly stated, 318 U.S. at 169-170:

> None of these views seems to us rightly to construe the statute. We think the Congress did not intend to deny the courts all power of review of Commission action in such cases. The statute plainly requires reference to the Commission of claims of the class under consideration, a hearing by that body, the setting of a maximum and action by the court on the footing of the Commission's report. It does not contemplate a hearing de novo on the issue of the reasonable worth of the services rendered or the propriety of the expenses incurred, or a reappraisal by the court of the facts. Moreover, the procedure suggested by petitioner does not comport with the evident purpose of §77(c)(12) which appears to treat the court's action with respect to such claims as a matter distinct from his final action on the plan as a whole under §77(e).
>
> Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law.

> With respect to the amount set as a maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not the court may so hold, set aside the finding and return the matter to the Commission. Under the terms of the subsection the judge's action upon the claim is subject to appeal independently of other issues, to the Circuit Court of Appeals. (Emphasis supplied)

Notwithstanding the Supreme Court's decision, the Reorganization Court totally failed to address itself to this issue. Rather, it simply overruled and vacated the Commission's orders without comment. The Court's failure to make any finding regarding substantial evidence alone was an error and requires its decision to be reversed and its order vacated.

Moreover, we submit that there was, in fact, substantial evidence to support the Commission's decision. Traditionally, Section 77(c)(12) claimants have been compensated from the estate of a railroad in reorganization only to the extent that their services benefited the estate. In re Chicago M. St. P. & P.R. Co., 138 F.2d 433, 435-37 (7th Cir. 1943); In re Boston & Providence Railroad Corp., 428 F.2d 159 (1st Cir. 1970) (expenses). The reason for this rule is that the estate is ordinarily represented by a trustee who has the primary duty and responsibility to protect the estate. If the trustee performs his duty, there is no need for anyone else to perform the same function. Furthermore, the estate should

not have to pay twice for the same service. Thus, the burden of proof is always on the claimant to show that his services benefited the estate and did not duplicate the effort of the trustee or his counsel. Here, the Commission specifically found that Iannotti's efforts were essentially supplemental to or duplicative of efforts expended by others at the direction of the New Haven trustee (App. 277-78a) and, consequently, it was unable to discern any benefits accruing to the estate from his services at that stage of the reorganization (App.279a). The Commission based its conclusion on the fact that while Iannotti's efforts for the most part were directed at protecting the equitable lien and constructive trust imposed on behalf of the New Haven trustee, the trustee, his counsel and special counsel were actively engaged in the same effort. (App.278a). On the basis of these facts, we submit that the Commission's decision was clearly based on proper findings and supported by substantial evidence of record. Nothing more was required of the Commission.

The Court not only failed to employ the substantial evidence test on review of the Commission's orders, but also erred in basing its order on the conclusion that the Commission had acted unlawfully in setting maximum limits of compensation at zero. The Court apparently overruled and vacated the Commission's orders for the reasons stated at the May 10, 1976, hearing on Iannotti's petition for review of the

Commission's orders. At that hearing the Court stated, in essence, that it would be difficult, if not impossible, to retain responsible persons to act as trustees and counsel for creditors and creditors if subsequent to their retention the Commission fixed their maximum limits of compensation at zero. Being of the view that such action would completely frustrate the Court's responsibility to see that creditors and bondholders were adequately represented, the Court found the Commission's actions under review to be unlawful, and, consequently, overruled, reversed and vacated its orders (App. 189a-191a).

With all due respect to the Court's view, we submit that its conclusion that the Commission's action was necessarily unlawful was erroneous. Over 30 years ago the Court of Appeals for the Seventh Circuit specifically held on remand from the Bankers Trust case that a Commission order setting a Section 77(c)(12) claimant's maximum limit of compensation at "nothing" was entirely proper. In re Chicago M. St. P. & P.R. Co., supra, 138 F.2d 433, the Court stated in pertinent part, 138 F.2d at 436:

> It is said that the Commission had no jurisdiction to fix a maximum limit of "nothing" as a reasonable allowance to appellants. The argument seems to be that the Commission was bound to allow some amount even though it were only nominal. But the Commission is charged directly with determination of the maximum allowance to any person. It follows that if, from the evidence, no services

> of value had been rendered, then, in order properly to perform its statutory duty, it was bound to find that the maximum that could be allowed was nothing. In other words, if nothing was earned, nothing could be allowed and the "maximum" to be fixed, therefore, was nothing. The finding means merely that the services rendered contributed nothing of value to the estate.

Thus, there was nothing unlawful about the Commission's decision. Indenture trustees and their counsel must simply look to their clients rather than to the general estate for compensation. In re Chicago M. St. P. & P.R. Co., supra, 138 F.2d at 436; In re New York Investors, 79 F.2d 182, 136 (2nd Cir. 1935), cert. den., Endelman v. R.F.C., 296 U.S. 649.

On the basis of the foregoing, we respectfully submit that the Reorganization Court's Order No. 789A was clearly erroneous and without warrant in law.

II.

THE REORGANIZATION COURT LACKED JURISDICTION TO AWARD COMPENSATION TO THE VARIOUS SECTION 77(c)(12) CLAIMANTS WITHOUT FIRST REFERRING THEIR PETITIONS TO THE COMMISSION FOR THE SETTING OF MAXIMUM LIMITS.

The essence of our appeal from the Reorganization Court's Order of June 30, 1976, awarding compensation to the various Section 77(c)(12) claimants is that the Court lacked jurisdiction to make those awards without first referring the claimants' petitions to the Commission for the setting of maximum limits. In our view the Court's conclusion that by operation of Section 618(b) of the 4R Act the former powers and duties of the Commission under Section 77 of the Bankruptcy Act with regard to the reorganization of the New Haven terminated on February 5, 1976, and thereafter vested in the Reorganization Court is subject to an important caveat. To wit, we believe that Section 618(b) has prospective application only. The Commission's jurisdiction over Section 77 matters terminated on February 5, 1976, only with respect to services rendered after that date. On the other hand, services rendered by Section 77(c)(12) claimants prior to February 5, 1976, are not, we submit, affected by Section 618(b). Consequently, petitions for compensation for services rendered prior to February 5, 1976, must still be referred to the Commission for the setting of maximum limits before the Reorganization Court may make awards.

Our position is based on the fact that the services of the indentured trustees and their counsel were retained during a period of time in which the Commission unquestionably had jurisdiction to fix maximum limits of compensation. Certainly, the claimants had actual or constructive knowledge of this fact when they agree to act in their respective capacities. Moreover, virtually all of the services for which compensation was awarded were performed during a period of time in which the Commission had jurisdiction. In addition, all of the claimants submitted their original petitions for compensation to the Court with the full expectation that they would be referred to the Commission for the fixing of maximum limits (App. 36a-74a, 215a). In these circumstances we believe that the only reasonable interpretation of Section 618(b) is that it has only prospective application.

Our view is supported, in addition, by the overall statutory scheme of which Section 77(c)(12) was and is a part.[6/] Congress intended Section 77 to be a method whereby the services rendered to the public by a bankrupt railroad

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6/ It is important not to lose sight here of the fact that the Commission's Section 77(c)(12) jurisdiction was terminated as to only those relatively few railroads subject to the 4R Act and the Final Systems Plan. Regardless of the ultimate outcome of this proceeding, the Commission's Section 77(c)(12) jurisdiction continues to remain viable over all railroads in reorganization and not covered by that legislation.

could be continued while a plan of reorganization was developed, and, at the same time, it is a method for protecting the equity of the railroad's creditors. Because of the dual nature of the proceedings, Congress specifically provided that both the Reorganization Court and the Interstate Commerce Commission were to be integral parts of the process. See, New Haven Inclusion Cases, 399 U.S. 392, 423 (1970); Palmer v. Massachusetts, 308 U.S. 79, 87 (1939). The reason for intertwining the Court's authority with that of the Commission was described by the Supreme Court in Palmer, 308 U.S. at 86-87:

> * * * Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act. [Footnote omitted] But the long history of federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. [Footnote omitted] Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission.13/ Congress stopped

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13/ See 76 Cong. Rec., Pt. 5, P. 5358 (remarks of Representative LaGuardia): "I would like to see the entire reorganization taken from the courts and placed in the Interstate Commerce Commission." The suggestion for administrative receiverships originated with the late Chief Justice Taft, when Circuit Judge, in an address before the American Bar Association. Taft, "Recent Criticism of the Federal Judiciary," Reports of the American Bar Association (1895) 237, 264.

short of this remedy. But the whole scheme of §77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission.14/

14/ Section 77(c) requires the appointment of trustees to be ratified by the Commission; §77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; §77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval, §77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; §77(c)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; §77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; §77(c)(12) gives the Commission supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; §77(d) and 77(e) give to the Commission control over any proposed plan of reorganization; §77(p) gives to the Commission control over the solicitation of proxies or deposit agreements.

Thus, it is evident that in accordance with the responsibilities delegated to it by Congress, the Commission was required by Section 77(c)(12) of the Bankruptcy Act to fix the maximum limits of compensation to be paid to the indentured trustees and their counsel. Indeed, this scheme is no less applicable to services rendered prior to February 5, 1976, because Congress has now directed the New Haven's rail properties to be transferred to ConRail and has terminated the Commission's Section 77 jurisdiction for the future. To the contrary, we believe that if Section 618(b) is applied retroactively to services rendered prior to February 5, 1976, the statutory scheme will be severely frustrated. If the appellees prevail in their interpretation of Section 618(b) the claimants, on the one hand, will avoid, and the beneficiaries of Section 77(c)(12), on the other hand, will be deprived of the Commission's traditional and expert evaluation of such claims dating back to the late 1930's. We simply do not believe that Congress intended such a result. Certainly, there is nothing in the explicit language of Section 618(b) or its legislative history that suggests the section is to be given retroactive application.

For all of the above reasons, we respectfully submit that the Reorganization Court lacked jurisdiction to award compensation to the several claimants without first referring their petitions to the Commission for the setting of maximum limits.

III.

THE COMMISSION IS NOT ESTOPPED FROM APPEALING THE REORGANIZATION COURT'S ORDER AWARDING COMPENSATION TO THE VARIOUS SECTION 77(c)(12) CLAIMANTS.

The appellees in response to this brief will undoubtedly contend that the Commission is estopped from appealing the Reorganization Court's order of June 30, 1976, awarding compensation to the various Section 77(c)(12) claimants. In their view the Commission has effectively waived its right to challenge the District Court's jurisdiction to award compensation because it concurred in, and did not appeal from, the Court's prior order of April 14, 1976, finding that the Commission's jurisdiction terminated on February 5, 1976. We, on the other hand, submit that there is no merit to this position.

It is well-established that before the doctrine of res judicata may be applied there must first be a valid judgment adjudicating some matter in another action between the same parties on their privies. As pertinent to this appeal, moreover, the judgment must be "final" in nature as "only a final judgment is res judicata." G & C Meriam Co. v. Saalfield, 241 U.S. 22, 28 (1916). Thus, an interlocutory decree will not support a plea of res judicata unless in some respect it makes a final disposition of the matter. Recter v. Universal Marion Corp., 173 F. Supp. 13, 15 (D.D.C. 1959). In this

case we submit that the Court's orders of April 14, 1976, were not "final" orders with respect to the award of compensation to the Section 77(c)(12) claimants.

In essence, the Court's order was simply declaratory or interlocutory in nature. It ordered no compensation to be awarded. Rather, it stated only that by operation of §618(b) of the 4R Act all powers and duties of the Commission under Section 77 terminated as of Feburary 5, 1976, and became vested in the Court. The "final" action in this matter was not taken until the Court actually awarded compensation - without referral to the Commission - to the claimants on June 30, 1976.

In any event, appeal from the order entered April 14, 1976, would have been premature. Until the Court actually acted on the petitions for compensation, as it did on June 30, 1976, there was no way of knowing what, if any, compensation would be awarded to the claimants. If the Court desired, it could have set the maximum limits of compensation for the various claimants at zero - just as the Commission had previously done with respect to Iannotti. Had the Court done so, no appeal would have been necessary as it is clear that a reorganization court has the power to fix maximum limits of compensation under Section 77 in an amount less than that set by the Commission. In effect, had the Commission appealed

from the April 14, 1976, order it would have been second-guessing the Court's future actions. Moreover, we submit this is true even though the Court had indicated on prior occasions that it believed the claimants were entitled to compensation. Nothing was certain or "final" until the Court actually issued its order awarding compensation on June 30, 1976. In these circumstances we, therefore, submit that the Court's order of April 14, 1976, was not a "final" order for the purposes of applying the doctrine of res judicata. Accordingly, the Commission is not estopped from appealing the Court's subsequent order of June 30, 1976.

CONCLUSION

For the foregoing reasons the Interstate Commerce Commission requests the Court to do the following:

1. If the Court decides in favor of the Commission on both orders appealed from: a) reverse Order No. 789A and remand with directions to review the Commission's orders solely on the basis of "substantial evidence" and b) reverse the Court's other order awarding compensation and remand with directions to refer the various petitions - except that portion of the Iannotti petition already finally acted upon by the Commission - to the Commission for the initial setting of maximum limits.

2. If the Court decides in favor of the Commission only with respect to Order No. 789A, find that the District Court's order was clearly erroneous and without warrant in law, and then vacate for mootness in view of the District Court's concurrent consideration of Iannotti's new petition for compensation.

Respectfully submitted,

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